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In the Supreme Court of the United States

OCTOBER TERM, 1959

PETER CASELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
EUGENE L. GRIFFIN,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 63b)[1] is reported at 270 F. 2d 503.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1959 (R. 64b). The petition for a writ of certiorari was filed on November 10, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R. —a" refers to the appellant's appendix in the court of appeals; "R. —b," to the appellee's appendix.

QUESTIONS PRESENTED

1. Whether petitioner's constructive possession of narcotics sold by his agent is sufficient to render the statutory presumption of unlawful importation arising from possession applicable to him.

2. Whether the sentence imposed was lawful.

STATEMENT

A four-count indictment filed in the United States District Court for New Jersey on April 15, 1958, charged petitioner and James Santore with receiving (count II) and selling (count I) unlawfully imported narcotic drugs (21 U.S.C. 174) and with selling narcotic drugs which were not in the original stamped package (count III, 26 U.S.C. 4704) and which were not sold pursuant to a written order (count IV, 26 U. S. C. 4705) (R. 1a, 3a-5a). Following a jury trial, petitioner was found guilty as charged. On January 5, 1959, he was sentenced to fifteen years' imprisonment on each of counts I and II (the terms to be concurrent), and ten years' imprisonment on each of counts III and IV (the terms to be concurrent with each other but consecutive to the first two counts). The entire sentence was made concurrent with a forty-year sentence which petitioner had received on July 31, 1958, for other offenses (R. 2a-3a).[2] The court of appeals affirmed.

The evidence may be summarized as follows:

On October 16, 1957, federal agents Marshall and Picini met petitioner's codefendant, Santore, in Philadelphia, with a view to meeting Santore's "New York

[2] Affirmed by the Court of Appeals for the Second Circuit on October 2, 1959. See *United States* v. *Santore et al.*, No. 25330.

connection" (R. 8a). Soon thereafter, petitioner joined the group, telling the agents that he had already been informed by Mr. Santore that they were "interested in purchasing large quantities of heroin, pure heroin, * * *" (R. 9a). Petitioner said that he was able to supply from "half a kilo up to a ton of pure heroin" at a "price of $11,000 per kilo" (R. 10a).[3]

Intermittent contacts between the agents, petitioner, and Santore continued until January 3, 1958, when the foursome met for lunch near Pleasantville, New Jersey (R. 10a, 12a). At that time petitioner asked the agents "to take a quantity of smoking opium and 5 kilos of heroin, as soon as possible." When the agents agreed to purchase the heroin plus 200 cans of opium, petitioner asked for an advance of $1,500, to be deducted from the total purchase price (R. 12a). At petitioner's direction, the advance was given to Santore on January 8, 1958 (R. 13a, 15a).

On January 14, 1958, the agents met with petitioner and Santore to make final arrangements for the delivery of the narcotics. It was agreed that the narcotics would be delivered by Santore at a motel near Atlantic City, New Jersey, on January 21, 1958. Petitioner mentioned that on the night of the delivery "he was going to meet his New York suppliers or partners somewhere near the motel, and that the heroin and opium would be delivered or transferred to Santore's car" (R. 14b). The agents were to pay for the narcotics in installments (R. 15a-16a). Later, it became necessary to change the delivery time to the following night (R. 18a-19a).

[3] A kilogram is slightly more than 35 ounces (R. 10a).

At about 4:45 p.m. on January 22, 1958, the day of delivery, Santore parked his automobile in front of petitioner's residence in Ventnor, New Jersey (R. 16a-17a, 53a-54a, 6b-7b). The vehicle remained there until about 12:50 a.m. the following morning, when it was backed out of petitioner's driveway and driven off toward Atlantic City (R. 8b). At about 2:00 a.m., Santore, in the automobile, arrived at the delivery point with five kilos of heroin and four cans of opium. After Marshall and Picini examined the contents, Santore was arrested by other agents waiting nearby (R. 20a-22a). There were no tax stamps on the drug containers, and the agents did not furnish an order form to either petitioner or Santore (R. 22a-23a, 39a).

ARGUMENT

1. Petitioner's argument that the possession of narcotics by a joint actor is not sufficient "to make the statutory presumption arising from possession applicable" to an aider and abettor (Pet. 8) is unsupportable. Petitioner was the principal actor in the transaction, and his use of an intermediary in completing the transportation and sale of the narcotics did not mean that Santore's possession, and the presumption of illegal importation flowing therefrom,[4] cannot be imputed

[4] Petitioner's argument runs only to that portion of counts I and II alleging illegal importation, since there was direct evidence that the narcotics were received and then sold to the agents and that the drugs were not in the original stamped packages. Thus, the statutory inference of receipt or sale which 21 U.S.C. 174 provides shall be drawn from the unexplained possession of narcotics, and the statutory inference of sale without stamps which 26 U.S.C. 4704 provides shall be drawn from the unexplained possession of narcotics without stamps, only buttress the direct evidence as to those elements of counts I-III. There is no statutory inference arising from possession as to the order form provision in 26 U.S.C. 4705 (count IV).

to him. From the very beginning of the negotiations it was perfectly clear that petitioner, not Santore, was in command. It was petitioner who had a source of supply, negotiated the terms of sale and delivery, and was to receive the proceeds. The fact that he used Santore as his instrument in consummating the delivery does not permit petitioner to evade the consequences that would follow if petitioner acted directly.

18 U.S.C. 2 provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense, or "willfully causes an act to be done which if directly performed by him or another would be an offense," is punishable as a principal.[5] Thus, to be liable as a principal it is necessary only that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Nye & Nissen* v. *United States*, 336 U.S. 613, 619, quoting *United States* v. *Peoni*, 100 F. 2d 401, 402 (C.A. 2); see *Pereira* v. *United States*, 347 U.S. 1, 9-11.

The venture in which petitioner associated himself was to buy and sell illegally imported narcotics without an order form and without tax stamps. Petitioner as an aider and abettor stood in Santore's shoes. When Santore bought and sold illegally imported drugs, that act was petitioner's. Personal custody or manual possession of the narcotics by the aider and abettor is not essential in order to bring the presumption of unlawful importation into operation against him. His construc-

[5] The trial court gave full instructions on aiding and abetting, as well as instructions on possession and constructive possession (R. 93a-94a, 97a, 98a).

tive possession, as in this case, is enough. *United States* v. *Moia*, 251 F. 2d 255 (C.A. 2); *United States* v. *Cohen*, 124 F. 2d 164 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811.[5] Were it otherwise, a principal would be subject to a lesser liability than his agent.

2. *a.* Petitioner asks this Court to reconsider and reverse the rule laid down in *Blockburger* v. *United States*, 284 U.S. 299, and reaffirmed recently in *Harris* v. *United States*, 359 U.S. 19, and *Gore* v. *United States*, 357 U.S. 386, but he does not offer any considerations not already considered and rejected by this Court. The *Gore* decision is bottomed on the assumption that the three offenses arose out of one act of sale. *Harris* deals with consecutive sentences imposed for purchasing narcotics not in or from the original stamped package and receiving and concealing the same drug knowing it to have been unlawfully imported, both arising from one act of possession. The constitutional argument of double jeopardy was also discussed and found wanting by the majority in *Gore* (357 U.S. at 392-393).

[5] The cases relied upon by petitioner are inapposite. *Harris* v. *United States*, 359 U.S. 19, 24, had nothing to do with the question whether constructive possession is sufficient to raise the presumption of unlawful importation; the phrase "direct evidence" or "direct proof" was there used only to distinguish the facts proved by evidence and those established by statutory presumption. Here, possession and sale by Santoro was proved by "direct evidence," and the only question is whether the statutory presumptions thereby created are applicable against his principal as well as against him. *United States* v. *Landry*, 257 F. 2d 425 (C.A. 7); *Jackson* v. *United States*, 250 F. 2d 772 (C.A. D.C.); *Grantello* v. *United States*, 3 F. 2d 117 (C.A. 8); and *Wilkinson* v. *United States*, 286 Fed. 852 (C.A. 8), hold, on their separate facts, that there was insufficient evidence of constructive possession, but that does not mean that constructive possession, when shown, is not enough to raise the statutory presumption.

since the test of separateness of offenses is what elements must be established to convict, not what evidence is sufficient to establish them. It is therefore inappropriate to retrace here the ground already covered in *Gore* and *Harris*.

b. Yancy v. *United States*, No. 47, this Term, certiorari granted, 359 U.S. 941, involves consecutive sentences imposed on two counts charging, respectively, a purchase and a sale of the same quantity of narcotics on the same day, both in violation of the stamped-package requirement of the Internal Revenue Code. Had there been consecutive sentences on counts I and II, this case would have been analogous to *Yancy* in that counts I and II allege a purchase and a sale of the same quantity of narcotics on the same day, both in violation of 21 U.S.C. 174, dealing with unlawfully imported narcotics. Unlike *Yancy*, however, the sentences on counts I and II were concurrent, not consecutive. There is thus no reason to delay disposition of this petition until *Yancy* is decided, since the first portion of the sentence is supported by at least one good count. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *United States* v. *Sheridan*, 329 U.S. 379, 381.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

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